LEOW NYOK CHIN

v.

PP

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[CRIMINAL TRIAL NO: 45-24-98]
11 DECEMBER 1998

CRIMINAL PROCEDURE: *Bail - Non-bailable offence - Woman offender - How should court consider such applications - Whether court should determine if there appears reasonable grounds that accused is guilty or whether court has a discretion in such applications - Whether bail ought to be granted only if special reasons exist - Criminal Procedure Code, s. 388(1)*

CRIMINAL PROCEDURE: *Bail - Non-bailable offence - Woman offender - Psychiatric illness - Suicidal tendencies - Whether bail ought to be granted - Whether convenience of receiving medical treatment ought to be considered - Criminal Procedure Code, s. 388(1)*

This was an application for bail. The accused, a 58 year old lady, was charged with the murder of her husband. The accused submitted that pursuant to s. 388(1) of the Criminal Procedure Code ('the CPC'), bail is only to be refused in cases punishable with death or life imprisonment if there appears reasonable grounds for believing that the accused is guilty of such offence. Here, the accused contended, there was no evidence to show that the accused was guilty as charged and thus without even having to rely on the proviso to s. 388(1) of the CPC, the accused was eligible for bail. The prosecution, meanwhile, asserted that the facts revealed in the charge preferred against the accused compounded with the consent of the Public Prosecutor sufficiently shows that there appears reasonable grounds for believing that the accused is guilty of murder.

Additionally, the accused claimed that being a woman, she was eligible for bail under the proviso to s. 388(1) of the CPC. Furthermore, the accused submitted other grounds which justified the granting of bail and these included: (i) by reason of her medical condition she needs to obtain psychiatric and/or medical observation which will be made easier if she is on bail; (ii) she needs help of the kind that will cure her mental disease and arrest it before it progresses into something permanent; and (iii) she requires constant care and emotional support to speed up her recovery and this can be provided by her family, failing which she would be driven to insanity and thus become unfit to plead. A medical report was submitted and, *inter alia*, it recommended that

the accused be placed in an environment which will provide her mental, physical and emotional stability. Further, the report revealed that the accused suffers from major depression with psychotic features, symptoms of which include hallucinations, delusions and suicidal tendencies.

Held:

[1] The prohibition to the granting of bail in s. 388(1) of the CPC by the words "but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life" does not apply where the person accused of such an offence is a person below 16 years of age, a woman or is sick or infirm.

[1a] The proviso to s. 388(1) of the CPC confers upon the court in clear and unambiguous terms a discretion, in the instances mentioned, to consider the grant of bail notwithstanding that the person is charged with an offence punishable with death or life imprisonment.

[1b] Therefore, whether or not the accused is to be granted bail depends on whether this is a proper case for the court to exercise its discretion in favour of the accused. That discretion is a judicial one to be exercised according to correct principles and considerations.

[2] In considering the merits of a bail application, the court must take into account and give due weight to all relevant facts and circumstances of the case for it is the net result of all the considerations for and against the accused which will ultimately decide the matter.

[3] In cases where the offence is punishable with death, the court's discretion should be exercised sparingly and judiciously and bail should only be granted where the reasons put forward for its grant are said to be exceptional and very special reasons.

[4] There is nothing in the medical report to suggest that the treatment needed cannot be obtained while in detention or that she will be deprived of such treatment or attention while in custody.

[5] With regard to the submission that the psychiatric and/or medical observation which the accused needs will be made easier if she is on bail, convenience is not a matter that the court will give any weight to in an application for bail.

[6] The revelation in the report that the accused exhibits suicidal tendencies brought about by her illness cannot be ignored since it is of immediate relevance when considering whether the accused will appear for her trial if allowed bail.

[Application refused.]

Cases referred to:
Che Su Daud v. PP [1978] 2 MLJ 162 ***(aff)***
PP v. Latchemy [1967] 2 MLJ 79 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 177A, 388(i)
Penal Code, s. 302

Other source referred to:
Sohoni's The Code of Criminal Procedure, 1973, 2nd edn, pp 4549 & 4554

For the prosecution - Murtazadi Amran
For the accused - Hira Singh; M/s Asbir, Hira Singh & Co

Reported by S Dharmendran

JUDGMENT

Clement Skinner JC:

On 3 December 1998, Leow Nyuk Chin (hereinafter the accused) was brought before me, charged with the offence of murder under s. 302 Penal Code (PC). Earlier on the same day, the Batu Gajah magistrate's court had made an order, pursuant to s. 177A Criminal Procedure Code (CPC), transmitting her case for trial by the High Court.

On her appearing, the charge under s. 302 PC was read over and explained to the accused. The charge reads as follows:

> Bahawa kamu LEOW NYOK CHIN (P) KP. NO: 400929-08-5182 pada 22 July 1998 diantara jam lebih kurang 10.00 malam hingga 10.30 malam di dalam rumah No. 9 Jalan Lebuh Sayang 2, Taman Sayang, Batu Gajah, di dalam Daerah Kinta, di Negeri Perak Darul Ridzuan, telah melakukan pembunuhan ke atas CHAN KIEW @ CHIN KIEW (L) KP. NO. 420403-08-5135, dengan itu kamu telah melakukan suatu kesalahan yang boleh di hukum di bawah Sek. 302 Kanun Keseksaan.

On the accused confirming she understood the charge, her plea was taken. She claimed trial to the charge. I then fixed her trial to commence on 26 April 1999 till 30 April 1999.

Mr. Hira Singh (hereinafter learned counsel) who represents the accused then made an oral application for bail on her behalf. I summarise below the arguements put forward by learned counsel

First, the facts and personal circumstances relevant to her application for bail. The accused is 58 years old. She is accused of murdering her husband and voluntarily surrendering herself to the police on 23 July 1998. She is an ex-civil servant, having served from 1 January 1963 until her retirement on 1 March 1994 as a school teacher. She married the deceased in 1966 and from the marriage there are four children. Her personal and married life has not been without its trials and tribulations. It is submitted on her behalf that she has had to suffer the ways of a philandering husband and bear the pain, anxiety and humilation that brings. She has contributed financially to her husband's business and the children's education as a result of which his business expanded and the children received good education, including going overseas for the same. In a nutshell, the accused enjoys good standing in society and is a person of good character.

Next, the law. Learned counsel submits that the liberty assured to every individual by art. 5 of the Federal Constitution, should be given effect to by the grant of bail to the accused pursuant to s. 388(i) CPC. This section provides that bail is only to be refused in cases punishable with death or life imprisonment if there appears reasonable grounds for believing that the accused is guilty of such offence. However, in this case, the prosecution has not been able to produce any evidence or place any facts before the Court to show that there are reasonable grounds for believing the accused is guilty of the offence. In reply to the submission of the learned DPP that the charge and the consent of the Public Prosecutor are sufficient for that purpose, learned counsel submits that when the charge is looked at, it does not contain any particulars from which it can be said there appears reasonable grounds for believing the accused is guilty of the offence. According to learned counsel, the consent of the Public Prosecutor to the institution of these proceedings also suffers from the same infirmity.

In contrast to the inability of the prosecution to show reasonable grounds, learned counsel submits that even at this stage of the proceedings, there are reasons to believe that the accused may never be convicted of the offence charged. Such reasons are afforded first, by the cautioned statement made by the accused to the effect that she had no inclination of what happened on the night of the incident, and second, by a medical report on the state of mind of the accused, issued by Hospital Bahagia on 30 October 1998 which negates any grounds, if they exist, for believing the accused is guilty of the offence charged. The accused is therefore clearly eligible to bail under the main provisions of s. 388(i) CPC without even having to rely upon the proviso

thereto which specifically states that the Court may grant bail to any person who is under 16 years or a woman, or is ill or infirm. Learned counsel has also set out suggested conditions upon which bail should be granted.

Lastly, learned counsel relies upon the following nine grounds on which bail should be granted:

(a) accused is a woman and so eligible for bail under the proviso to s. 388(i) CPC;

(b) accused has been a law abiding person with no previous record or trouble with the law;

(c) accused is unlikely to jump bail because of her strong family ties in Malaysia;

(d) due to her medical condition she needs psychiatric and/or medical attention failing which she could become permanently ill;

(e) she is unlikely to reoffend and is no threat to society;

(f) she is incapable of intimidating any prosecution witness or interfering with prosecution evidence;

(g) she requires the constant care and emotional support of her family to help her recovery, failing which she will become permanently insane;

(h) the character and standing of the accused should be considered;

(i) she needs to consult her solicitors to prepare her defence and to remain emotionally stable and needs to be in a place which provides mental, physical and emotional stability.

Bail is opposed by the learned Deputy Public Prosecutor (DPP) on two main grounds:

(a) murder is an offence punishable with death and under s. 388(i) CPC, the court shall not grant bail in non-bailable offences punishable by death where it appears there are reasonable grounds for believing the accused is guilty of such offence. This is such a case.

In support of the above, the learned DPP points out that at this stage of the proceedings, there is no requirement for the prosecution to produce evidence to prove the guilt of the accused beyond reasonable doubt. All the prosecution needs to show is that there **appears** (bold mine) reasonable grounds to believe the accused is guilty of murder. Such requirement is sufficiently established by the facts revealed in the charge preferred against

the accused and from the consent of the Public Prosecutor to the institution of these proceedings. It can be gathered from these documents that *prima facie*, there appears reasonable grounds for believing the accused is guilty of murder;

(b) even if the proviso to s. 388(i) CPC applies, no special and exceptional grounds have been shown why the accused should be granted bail. It is the learned DPP's submission that the matters stated in the medical report do not afford special and exceptional grounds. It is not any sickness that would entitle an accused person to bail. The sickness must involve a risk to life. In support the learned DPP refers to *Sohoni's The Code of Criminal Procedure* 1973, 2nd Edn. p. 4554. The learned DPP points out that it is stated in the medical report that the accused is now receiving treatment and that she is fit to plead.

Before considering the merits of the application, I must first consider the provision of law under which bail has been applied for. Murder, an offence under s. 302 PC is shown in the first schedule of the CPC as a non bailable offence. The law on the grant of bail in non-bailable offences is set out in s. 388 CPC. Learned counsel has in his written submission and in court stated that the application for bail is made under sub-s. (i) of s. 388 CPC. I shall therefore confine my consideration to sub-s. (i) which reads:

> (i) When any person accused of a non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a court, he may be released on bail by the officer in charge of the police district or by such court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.
>
> Provided that the court may direct any person under the age of sixteen or any woman or any sick or infirm person accused of such an offence be released on bail.

Now, learned counsel and the learned DPP engaged in a tussle over whether the prosecution had placed sufficient evidence before the court to demonstrate that there appears reasonable grounds for believing the accused to be guilty of the offence charged, it being argued that if there was such evidence, then the court must refuse bail (according to the learned DPP), otherwise, the accused should be released on bail (according to learned counsel).

I find however, that in considering whether or not to grant bail in this particular case, I need not decide on the competing contentions of the parties on this point because it is my reading of the above subsection that the prohibition imposed on the court to the granting of bail by the words "but he shall not be so released if there appears reasonable grounds for believing that

he has been guilty of an offence punishable with death or imprisonment for life" would not apply where the person accused of such an offence is a person below 16 years of age, a woman or is sick or infirm. The proviso to s. 388(i) CPC confers upon the court in clear and unambiguous terms a discretion, in the instances mentioned, to consider the grant of bail notwithstanding that the person is charged with an offence punishable with death or life imprisonment. There is nothing in the section to suggest that the words of the proviso are not to be given effect to in their plain ordinary meaning.

Following on from what I have stated above, I find that the accused's application for bail falls for consideration under the proviso to s. 388(i) CPC. Therefore, whether or not the accused is to be granted bail will depend on whether this is a proper case for the court to exercise its discretion in favour of the accused. That discretion is a judicial one to be exercised according to correct principles and considerations.

The learned DPP citing *Shoni (supra)* p. 4549, pointed out the various matters which a court may take into consideration when granting or refusing bail. They are:

(i) whether there is or is not reasonable ground for believing the accused is guilty of the offence;

(ii) the nature and gravity of the offence;

(iii) severity and degree of the punishment prescribed;

(iv) the chances of the accused absconding, if released on bail;

(v) the character, means and standing of the accused;

(vi) the danger of the offence being repeated or continued;

(vii) the danger of witnesses being tampered with;

(viii) opportunity of the accused to prepare for her defence;

(lx) the long period of detention and probability of a delay for a further period;

(x) the larger interest of the public.

I now consider the merits of the application. In doing so I must take into account and give due weight to all relevant facts and circumstances of this case, for as stated in the case of *Che Su binti Daud v. PP*, [1978] MLJ 162, it is the net result of all the considerations for and against the accused which will ultimately decide the matter.

First, the matters which are not in controversy. The accused is 58 years old, has a previous good record and is of good standing in society. There is no suggestion that if granted bail the accused will tamper with evidence or intimidate prosecution witnesses. Accordingly, these matters which form grounds (a), (b), (f) and (h) of her application weigh in her favour.

Next, the state of health of the accused. Learned counsel has tendered in court a medical report from Hospital Bahagia, dated 30 October 1998 and put forward three grounds based on medical reasons in support of bail, namely, (i) due to her medical condition (she is still on medication) the accused needs to obtain psychiatric and/or medical observation which will be made easier if she is on bail; (ii) accused needs help of the kind that will cure her mental disease and arrest it before it progresses further into something permanent and (iii) accused requires constant care and emotional support to speed up her recovery, and this can be provided by her family, failing which, accused would be driven to insanity and unfit to plead. To prepare for her defence, the accused needs to be in a place which provides mental, physical and emotional stability. These constitute grounds (d), (g) and (i) of her application.

In view of the submission of learned counsel, I have paid careful attention to the medical report. Set out below is the essence of each of the six paragraphs of the report:

(a) paragraph 2 states that all laboratory tests done showed normal;

(b) paragraph 3 states that the accused suffers from "major depression with psychotic features", an illness with the following symptoms: sadness, interruption in sleep, loss of apetite, low self esteem, suicidal tendencies. Apart from the above, there are also psychotic symptoms like hallucinations and delusions. The accused has received treatment from private doctors since 1985;

(c) paragraph 4 states that at the time of the incident the accused was aware of her actions but was not aware that the actions were wrong in law because of impairment of judgment;

(d) paragraph 5 states that the accused is now under treatment and she is fit to plead;

(e) paragraph 6 recommends that the accused continues treatment and medication carefully and diligently and be placed in an environment conducive to her mental and emotional well being.

From what is stated above, I cannot find in the medical report material to suggest, as learned counsel has, that the accused is in danger of being driven to permanent insanity unless she receives the emotional support and care that

the family will provide. I therefore find no merit in this submission. There is also nothing in the report to suggest that the treatment which the accused needs cannot be obtained while in detention or that she will be deprived of such treatment or attention while in custody. The report states that the accused is now under treatment. As such, I cannot accept the submission that the accused needs help of the kind that will cure her mental disease and arrest it before it progresses into something permanent. With regard to the submission that the psychiatric and/or medical observation which the accused needs will be made easier if she is on bail, I cannot regard convenience as a matter the court will give any weight to in an application for bail. I do take into account the recommendation in the report that the accused be placed in an environment to provide her mental, physical and emotional stability but in considering whether to give effect to such recommendation I must bear in mind the nature of the illness afflicting the accused. The report states that the accused suffers from major depression with psychotic features, symptoms of which include hallucinations, delusions and suicidal tendencies. On a weighing of these factors, the larger public interest outweighs that of the accused's and militates against the grant of bail. For the same reason I entertain doubts on the submission that the accused is unlikely to reoffend and is in no way a threat to society (ground (e)). Similarly, whilst it is submitted that it is unlikely that the accused will jump bail (ground (c)), the report points to the suicidal tendency brought about by her illness which I feel I cannot ignore since it is of immediate relevance when considering whether the accused will appear for her trial if allowed bail. The revelation of such a tendency, when taken into account leans against the grant of bail.

In addition to the above considerations, I also take into account the gravity of the offence with which the accused is charged – that of murder, the seriousness of which is reflected in the punishment for such offence – death. As pointed out in the case of *PP v. Latchemy* [1967] 2 MLJ 79, in cases where the offence is punishable with death, the court's discretion should be exercised sparingly and judiciously and bail should only be granted where the reasons put forward for its grant are said to be exceptional and very special reasons. For the reasons already given, I have not found the medical condition of the accused as affording her any exceptional or special reasons for bail. Neither do any of the other grounds relied upon by the accused.

In all the circumstances and giving due weight to the factors telling in favour of and against the accused, I have reached the conclusion that this is not a proper case for the exercising of judicial discretion in favour of the accused by the grant of bail. I accordingly refuse the application. The accused is to be remanded in custody until her trial at Kajang Prison.